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NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED

In implementing a field audit program in accordance with the "prudent man" rule of ERISA, may the trustees of multiemployer employee benefit funds, without being arbitrary or capricious, request access to payroll, tax, and other "pertinent records" relating to the wages, hours and duties of *all* employees of contributing employers:

1) Where the purpose of the audit is to monitor a self-reporting system and to assure compliance with statutory and contractual obligations;

2) Where the funds must award service credits and benefits to employees on the basis of work performed under a collective bargaining agreement even in the absence of employer contributions;

3) Where records relating to an employer's complete work force are necessary to comply with generally accepted auditing standards;

4) Where substantial safeguards are offered to protect the confidentiality of employee records;

5) Where the trust agreements governing the funds, as construed by the trustees, authorize such audits;

6) Where, absent such audits, the trustees must rely on the discretionary efforts of unions, employees, or the Secretary of Labor to oversee employer contributions and hence to protect the actuarial solvency of the funds.

OR

May employers withhold the records of all employees except those they *concede* are covered by the collective bargaining agreement *unless* the trustees first establish reasonable cause to believe that other individuals perform bargaining unit work and should be reported regardless of how the employer has classified them?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Introduction	1
The purpose of audits; the audit of Transport	2
Recapitulation of issues and arguments	6
ARGUMENT	9
I. THE TRUSTEES' INTERPRETATION OF THE TRUST AGREEMENTS IS REASONABLE IN LIGHT OF THE PURPOSES OF ERISA	9
II. CENTRAL STATES NEEDS THE TYPE OF AUDIT REQUESTED	11
a) The IRS and FLSA analogies	11
b) Union efforts do not afford an adequate safeguard	12
c) Audits are discretionary: the *right* to audit is distinct from a *fiduciary duty* to audit	15
III. THE TRUSTEES' NEED FOR INFORMATION OUTWEIGHS TRANSPORT'S INTEREST IN THE CONFIDENTIALITY OF EMPLOYEE RECORDS	16
CONCLUSION	20
APPENDICES A-C	A1-A19

TABLE OF AUTHORITIES

Cases:	Page
Aetna Casualty & Surety Co. v. Woods, 565 S.W.2d 861 (Tenn. 1978)	10
Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971)	12
Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981)	12
Byrnes v. DeBolt Transfer, 741 F.2d 620 (3d Cir. 1984)	7, 15
Carpenters v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982)	8
Central States, Southeast and Southwest Areas Pension Fund v. CRST, 641 F.2d 616 (8th Cir. 1981)	10, 13
Central States, Southeast and Southwest Areas Pension Fund et al. v. Kraftco, Inc., 589 F. Supp. 1061 (M.D. Tenn. 1984; appeal pending, 6th Cir. Nos. 84-5518; 84-5868)	15
Central States, et al. v. R-W Service System, Inc., No. 82-1899 (6th Cir. Aug. 25, 1984)	4
Central States, Southeast and Southwest Areas Pension Fund v. Theut Products, Inc., No. 82-71080 (E.D. Mich. 1982)	3, 17
Curtiss-Wright v. NLRB, 347 F.2d 61 (3d Cir. 1965)	13
Detroit Edison v. NLRB, 440 U.S. 301 (1979) (1979)	16, 17, 19, 20
EPA v. Mink, 410 U.S. 73 (1973)	19
Florida Central Railroad Co. v. Schutte, 103 U.S. 118 (1880)	10
Fusari v. Steinberg, 419 U.S. 379 (1975)	5
Griswold v. Connecticut, 381 U.S. 479 (1965)	16
Hollywood Brands v. NLRB, 53 L.R.R.M. 1012 (1963), *aff'd*, 324 F.2d 956 (5th Cir. 1963)	13
Laborers v. Kaufman & Broad, 707 F.2d 412 (9th Cir. 1983)	7, 8

TABLE OF AUTHORITIES—(Cont'd)

Cases: Page

Local 24, IBT v. Oliver, 358 U.S. 283 (1959) 14

McNeff v. Todd, 461 U.S. 260 (1983) 7

Marshall v. Barlow's, 436 U.S. 307 (1978) 17, 18

Nichols v. Trustees of Asbestos Workers Pension Plan 3 EBC 1726 (D.D.C. 1982) 7, 16

NLRB v. Acme Industrial Corp., 385 U.S. 432 (1967) 17

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 19

NLRB v. Rockwell-Standard, 410 F.2d 953 (6th Cir. 1969) 13

Oil, Chemical & Atomic Workers Local v. NLRB, 711 F.2d 348 (D.C. Cir. 1983) 17

Riley v. MEBA Pension Trust, 520 F.2d 406 (2d Cir. 1977) 9

Robbins, et al. v. Prosser, et al., 700 F.2d 433 (8th Cir. 1983) 13

Schneider Moving & Storage v. Robbins, 104 S. Ct. 1844 (1984) 9, 10, 12, 13

Skidmore v. Swift, 323 U.S. 134 (1944) 8

Tennessee Bond Cases, 114 U.S. 663 (1885) 10

Waggoner v. Dallaire, 649 F.2d 1362 (9th Cir. 1981) 15

Statutes:

Freedom of Information Act
5 U.S.C. § 552 19
5 U.S.C. § 552(b)(2) 19
5 U.S.C. § 552 (6)b 19

National Labor Relations Act, Section 8(a)(5) 13, 18

Employee Retirement Income Security Act,
29 U.S.C. § 1059 18
29 U.S.C. § 1103(c)(2)(A) 7

TABLE OF AUTHORITIES—(Cont'd)

Statutes: Page

29 U.S.C. § 1104 2

29 U.S.C. § 1104(a)(1)(B) 12

29 C.F.R. § 2520.140b-1(b)(1) 8

Miscellaneous:

Landis, "Statutes and the Sources of Law," *Harvard Legal Essays* (1934) 11

Personal Privacy in an Information Society, "Employment Records" (1978) 18

"The Relevance of Legislative Facts in Constitutional Law," 114 *U. Pa. L.R.*, 637 (1966) 11

Comptroller General of the United States, *Report to the Congress, Incomplete Participant Data Affect Reliability of Values Placed by Actuaries on Multiemployer Pension Plans*, GAO/HRD 84-38, (September 6, 1984) 6

Restatement, *Contracts* § 236(f) 10

STATEMENT OF THE CASE

His reasons are as two grains of wheat hid in two bushels of chaff. You shall seek all day ere you find them, and, when you have them, they are not worth the search. (Shakespeare, *The Merchant of Venice*, Act I, Scene 1)

Introduction

Having analyzed Transport's "facts" and "arguments," Central States scarcely recognizes the case as the same one that wound its way through the lower courts to find itself before this Tribunal some 18 Briefs and four years after the original Complaint was filed. To begin with, the "Question Presented" distorts the issue and leads the Court off to a false start. In support of its position that Central States does not have a contractual or statutory right to conduct random general audits to verify the accuracy of employer reporting and to uncover undisclosed (as opposed to merely "suspected" participants), Transport asks: "Whether a multiemployer employee benefit fund maintained for Union workers can force a contributing employer to disclose confidential records concerning employees the Union has determined are not performing Union work . . ."

First, Central States is not "maintained for Union workers" only. The National Master Freight Agreement ("NMFA"), the very contract signed by Transport, contains a broad union security clause authorizing a union shop, an agency shop, or any shop permitted or required by state law (App. A, p. 2-7). Central States' jurisdiction includes "right to work" states such as Iowa. The Sixth Circuit itself stated that "union membership is not a prerequisite to coverage so that both union and nonunion employees are covered if their job classification is . . . described" in "the NMFA and/or supplements" (App. B P.C., p. 16). Central States Pension Plan (cited by Transport, R.B., pp. 5a-15a) expressly prohibits exclusion because of lack of union membership. Section 3.01(e) of the Plan states: "Neither membership nor lack of membership in any labor organization shall be a basis for participation in, or eligibility to receive benefits from, the Pension Plan."

Second, no Union was involved in this suit at *any* stage of the proceedings, either at the local, area, or international level. On this point, the Court is referred to the entire district court and appellate record. Hence, there was *no prior determination by the Union and the employer* to

substantiate Transport's allegation that 60% of its employees were *not performing Union work*. By framing the "Question" in this fashion, Transport is clearly laying a foundation for its later proposition that Central States' audits are designed to undermine, "abrogate," and unilaterally "modify" valid agreements between employers and unions, to expand the bargaining unit, and to raid participants from other funds. Aristotle, however, observed long ago that "we ought in fairness to fight our case with no help beyond the bare facts" (*Rhetoric*, III, 1403d-1405a). The purpose of this Reply is to recall the facts, to recapitulate the issues, and to place Transport's "parade of horribles" in proper perspective.

The purpose of audits; the audit of Transport

Central States, like most Taft-Hartley multiemployer plans of any appreciable size, *must* operate on a self-reporting system; hence the Trustees *must* rely on contributing employers to report correctly, as the district court noted (App. A P.C., p. 6). Nevertheless, misreporting occurs, both as a result of clerical errors and mistakes of fact or law or through intentional omissions. To encourage correct reporting and to deter evasions, Central States has established a field audit program and conducts random inspections of contributing employers' records under the authority of ERISA's "prudent man" rule (29 U.S.C. § 1104) as well as Art. III, Sec. 5 and Art. IV, Sec. 14(e) of the Fund Trust Agreements (App. F P.C., pp. 46, 47).

While Central States *requests access* for (GAAS) testing purposes to a variety of records, very few classes of records are actually inspected unless discrepancies or disputes occur or unless the employer does not *maintain* the basic tie-in documents.[1] However, a prudent auditor must initially satisfy himself that all employees of a contributing employer are accounted for. This is typically done by comparing payroll totals with IRS 941 quarterly earnings forms. If access to basic tax and payroll data is withheld there is *no* way for the auditor to know whether other

[1] The fact that Central States obtained an injunction to preserve a variety of "pertinent records" (R.B., pp. 6-7; D-44) for future use does not mean that such records will be utilized unless necessary for a "reasonable" audit (M.B., p. 14-15, 30-31).

payrolls exist which could include individuals performing bargaining unit work or whether an employer has made cash disbursements to employees who might be covered by the collective bargaining agreement. Significantly, Transport's *own* Amicus, does not rebut the proposition that an independent verification of data through tie-in procedures is a proper accounting technique (Am. B., pp. 13, 16-18). (Amicus merely suggests alternatives which are less complete, less independent, and potentially more expensive, thus exposing the Funds to greater risk.) Transport nevertheless states that the Funds "have not and cannot demonstrate how their interests will be prejudiced if they are required to show 'reasonable cause' to conduct an audit of records for any non-bargaining unit employees" (R.B., p. 48).

Once this preliminary stage of the audit is concluded, the auditor merely checks some personnel files of employees listed on payrolls of "noncovered employees" to verify that they are not performing unit work. Central States does not request sensitive data from the personnel files of noncovered employees (see D-14, pp. 5,6).[2]

Central States also offers substantial safeguards to protect confidentiality (P.C., pp. 25-26; M.B., p. 15; D-8, pp. 7, 8, 20; D-14, pp. 3-8; D-16, p. 4). Contrary to Transport's assertions, the record reveals that these safeguards were offered to the company *long before* the 1982 *Theut Products* discovery and protective order (App. I P.C.) was adopted as standard audit policy. Indeed, the district court in 1981 was "mindful" of these assurances of confidentiality and the safeguards proposed when it balanced the employer's confidentiality interest against the Trustees' need for information (App. A P.C., p. 11). The court of appeals ignored these safeguards totally, and Transport states: "The Funds have proposed no mechanism for protecting the legitimate confidentiality interests of Transport and the majority of its employees" (R.B., p. 45).

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[2] However, in order to ascertain the regularity of employment, drivers' logs, trip manifests, leases, bills of lading and the like may be requested for "owner-operators" who are reported as "independent contractors" on IRS 1099 forms (M.B., p. 15; R.B., p. 47). Disciplinary letters in personnel files may also be requested to show actual "direction and control" in those jurisdictions in which courts require a showing of "employee" status on the basis of common law agency principles and not merely transportation law. Central States knows of no authority that requires an employer to keep personnel files on independent contractors and then to withhold information on the grounds of "employee confidentiality."

In 1980, a limited audit of Transport resulted in findings of $268,362.50. Transport omits these numbers which the court of appeals termed "instances of apparent underreporting" (App. B P.C., pp. 17, 30) and Deloitte, Haskins & Sells terms "immaterial" Am. B., p. 9).[3] The audit also revealed that Transport made contributions on behalf of four employees whose names did not appear on the payroll of concededly covered employees *or* on a seniority list. Transport did not explain the discrepancy. M.B., p. 9. The Sixth Circuit would permit Central States to extend its audit of concededly covered employees to the records of these four persons *only!*[4]

Three critical facts central to the resolution of this dispute have been either misapprehended or misstated.

First, the alleged delinquencies ($268,362.50) and discovery of four employees whose coverage status was unclear were the *result* of the audit; these findings did not *trigger* the audit as the court of appeals believed. Random audits cannot, by definition, be *triggered* by audit findings! For the same reason, it is virtually impossible for trustees in advance of a random audit to satisfy a "particularized reasonable cause standard" for disclosure.

Second, contrary to Transport's assertion (R.B., p. 3), Central States *never accepted* as "an uncontroverted fact which was part of the stipulated District Court record" that "60% of Transport's employees *are not covered by the collective bargaining agreement*." Verification of this allegation became a primary audit objective. *See*, for example, D-8, p. 16: "In the present case, it might well be regarded

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[3] See M.B., p. 8, fn. 8. Audit findings never represent more than potential liability which is subject to further conciliation or adjudication. All unknown or uncollected delinquencies contribute to a plan's unfunded vested benefits liability (see P.C., p. 8, fn. 7). Employers required to make up funding gaps or pay "withdrawal liability" would not regard $268,362.50 as immaterial.

[4] In *Central States, et al. v. R-W Service System, Inc.*, No. 82-1899 (Aug. 25, 1984), the Sixth Circuit refused to permit the Funds to complete an audit begun in 1978 although the company *paid $150,000.00 in delinquent contributions pursuant to that incomplete audit*. The basis of the scope limitation was the Funds' inability to show "reasonable cause" on an employee by employee basis. A showing of *actual delinquencies* was deemed insufficient cause. (*See* Government's Amicus Brief, p. 22 for a criticism of this standard; *see also* Deloitte, Haskins & Sells, pp. 10, 11, 14, 18.) The court also remanded an order compelling R-W to authorize the production of records in its constructive possession since it had destroyed the "pertinent records" necessary for completion of the 1978 audit (App. B).

as a breach of fiduciary duty were the Trustees simply to accept Defendants' statement that 60% of their employees are not covered by collective bargaining agreements without requiring any objective substantiating documents such as IRS forms." *See also* D-9, p. 11; D-14, p. 4; D-16, p. 3.

Third, the court condemned Central States' audits as a waste of fund assets without *any evidence* in the district court record as to the cost of the audit program relative to delinquencies collected or even as to the cost of the audit of Transport (*see* M.B., p. 17, fn. 20). A major theme in Transport's Brief, however, is that the Funds would be "wasting" assets if allowed to conduct "overreaching" audits (R.B., pp. 12, 41). Central States has already explained why its field audit program is *essential* to the health of the Funds and must be regarded as the "ordinary and natural" means for achieving express objectives set forth not only in ERISA but also in the applicable Trust Agreements. Thus far, Central States has attempted to establish its position with facts presented to the district court, relevant statutes, contracts, legislative history, and numerous cases showing how audits by other funds have uncovered delinquencies in a variety of factual situations, cases which Transport has largely chosen to ignore.

Petitioners believe that they are now compelled to rebut continuous speculative assertions about wasteful audit costs with a statement of fact that was not in the district court record:[5] the incomplete field audit of Transport in February and March, 1980 cost $24,424.28 and resulted in findings of $268.362.50 (App. C). Amicus Arthur Young noted that its study of Central States' audit records shows a potential 7-1 return for the period July, 1983 through July, 1984 based on findings totaling $5,540,000.00 at a cost of about $770,000.00 (Am. B., p. 17, fn. 7). Based on the O'Sullivan Affidavit (App. H P.C., pp. 83-84), the *incomplete* audit of Transport indicates a potential 10-1 return, which suggests that this audit was cost effective. Moreover, random general audits are also important for their deterrent effect.

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[5] To the extent this Court wishes to entertain the issue of costs in evaluating the permissible scope of an audit, Petitioners respectfully request that consideration be given to the information presented below. This information derives from records available to the DOL and IRS and has been included here under the authority of Supreme Court Rule 35.4 as interpreted in *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975).

Of significance is also a recent GAO report to Congress[6] indicating that many multiemployer plans have incomplete participant data, which affects the reliability of the actuarial valuations that underlie a plan's funding and benefits scheme. The Comptroller General noted, *inter alia*, that the DOL considers it part of ERISA's "prudent person" rule to make "reasonable and diligent efforts to collect participant data" (p. 12). Plan Administrators commented that missing data was partly due to a lack of cooperation by employers and unions. The GAO does not believe that the "prudent man" rule is *sufficient* to remedy the problem and recommends that the DOL issue regulations for the collection of participant data. Among other things, this "could provide plan administrators with additional leverage to gain the cooperation of reluctant employers and unions" (p. 31). The report focuses primarily on incomplete data on *disclosed* participants, especially missing or erroneous birthdates. It does not suggest that plans institute field audit programs such as that maintained by Central States in order to obtain the data needed. The fact is, however, that Central States' audits not only reveal reporting discrepancies related to *concededly covered participants; they also uncover the existence of undisclosed participants*. The "limited scope/ reasonable cause" approach to audits is in conflict with the GAO report and will exacerbate the problem of incomplete participant data and underfunding. The objections of Transport and its Amicus to Arthur Young's position that incomplete participant data could trigger a qualified opinion from the plan's independent accountant is also belied by the report (p. 30).

Recapitulation of issues and arguments

Central States' "Question Presented" sets forth with particularity the nature of the problem to be resolved as well as the basic contours of its argument in support of a comprehensive field audit program. In response, Transport argues, *inter alia:* that random general audits would undermine the collective bargaining process because they would lead to the "imposition" of Central States' Plans on "all

[6] Comptroller General of the United States, *Report to the Congress, Incomplete Participant Data Affect Reliability of Values Placed by Actuaries on Multiemployer Pension Plans*, GAO/HRD 84-38, "Data Reporting and Use" (September 6, 1984).

employees" of contributing employers without regard to the labor agreement (p. 46, fn 35); that such audits are designed to expand the bargaining unit and not to perform a fiduciary duty to participants and beneficiaries;[7] that such audits would result in inter-trustee competition for participants (and hence multiple lawsuits, pp. 14, 15, 37-40);[8] that such audits would result in the forfeiture of vesting service credit of any employee shifted from one plan to another (pp. 14, 38);[9] and that records of nonunit employees are "irrelevant" and beyond the scope even of the Federal Rules of Civil Procedure (p. 42.)[10]

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[7] *See* fn. 3, *supra*. Any "expansion" of the Central States pool will result from an *adjudication of coverage under the collective bargaining agreement by an arbitrator or a court*. The notion that Central States will "impose" its Plan on everyone regardless of operative labor agreements is preposterous. Similarly absurd is the statement that Central States claims a "fiduciary duty to each and every noncovered employee" (R.B., p. 32). The suggestion that Central States uses the threat of an audit to coerce employers into settling claims for delinquent contributions not otherwise owed (R.B., pp. 14, 37, 41) is outrageous and unsupported.

[8] No authority is cited for this absurd proposition. (The absence of cases indicating inter-fund competition for participants is telling, for it suggests that such disputes do not arise, are settled consensually, or are covered by reciprocal agreements such as described in *Nichols v. Trustees of Asbestos Workers Pension Fund*, 3 EBC 1756 (D.D.C. 1982).) Should a controversy over "jurisdiction" arise involving trustees, courts would be competent to resolve it as a "work coverage" dispute as in *Laborers v. Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983).

[9] This is a particularly egregious suggestion because it implies that predatory trustees could cause powerless employees to suffer forfeitures of vesting service credit upon being shifted from one plan to another. In fact, the plan to which an employee is shifted as the result of an audit would be required by ERISA to credit and fund all hours of service earned in covered employment. If a reciprocal agreement exists, the plan could recover contributions from the plan to which the employee first belonged. If not, the plan would have to seek contributions from the employer. To avoid paying twice, the employer could attempt to recoup payment from the first plan under 29 U.S.C. § 1103(c)(2)(A). It cannot be overemphasized that the employee himself cannot lose! Participants are entitled to vesting credit and benefits *regardless* of whether an employer pays or defaults on his contributions (M.B., p. 10).

[10] This may be swiftly rebutted by reference to *McNeff v. Todd*, 461 U.S. 260 (1983) and *Byrnes v. DeBolt Transfer*, 741 F.2d 620 (3d Cir. 1984), in which employers refused to produce pertinent records consensually but were compelled to do so in pretrial discovery. It is precisely because Central States does not wish to file expensive, time consuming, and burdensome lawsuits to compel audit records through discovery that comprehensive *consensual* audits are requested.

More concretely, Transport (and/or its Amicus) argues that Central States does not *need* the audit requested. First, unions can be relied upon to assure against employer misconduct by virtue of the duty of fair representation (p. 31); the right to seek a unit clarification before the NLRB;[11] and the ability to invoke the grievance mechanism of the labor agreement (p. 31). Second, union dues check-off lists are sufficiently complete, independent and objective to be used as the basic tool for verifying the accuracy of reporting (R.B., pp. 29-30; Am. B., pp. 16-17). Third, employees can and should be relied upon to vindicate their own rights to benefits (pp. 31-33).[12] Fourth, if the Court does not find a duty to audit records of "noncovered" employees, Central States will be insulated from liability should a "nonparticipant" make a claim.[13] Finally, Transport is a large financially solvent company which would be capable of satisfying a judgment should a recoupment action for retroactive delinquencies ever be necessary (Am. B., p. 14).[14]

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[11] Trustees have no standing to seek a "unit clarification" and they could not compel the union to address the NLRB. Courts are generally loath to deprive ERISA trustees of a federal court forum in deference to the "primary jurisdiction" of the NLRB. *See Kaufman & Broad, supra,* and *Carpenters v. Pratt-Farnsworth,* 690 F.2d 489 (5th Cir. 1982).

[12] The Solicitor of Labor (on behalf of the DOL) agrees with Central States that employees would not be estopped from claiming benefits merely because they failed to take action themselves to secure them (Am. B., p. 26). As the Agency entrusted with enforcing ERISA, the DOL's views are entitled to great weight. *Skidmore v. Swift,* 323 U.S. 134 (1944). As a practical matter, employee efforts to monitor employer reporting would provide extremely limited protection to the Funds even were employees sufficiently knowledgeable about their legal rights to make a complaint *and* were also *aware* their employer was cheating. (*See* P.C., pp. 15, 16, fn. 15.) DOL Reg. 29 C.F.R. § 2520.140b-1(b)(1) (Disclosure) states that "in no case is it acceptable merely to place copies of [material required to be disclosed to participants] in a location frequented by participants." But *see* R.B., p. 33. In accordance with the Sixth Circuit's "particularized reasonable cause standard," the Trustees could audit *only the records of the particular employee who complained! (See* fn. 4, *supra.)* There are about 500,000 *disclosed* participants and beneficiaries in the plan. No one knows how many *undisclosed* participants exit. A case by case approach to audits is a patently inefficient method for securing employer compliance.

[13] This miscasts the issue. An employee performing unit work is not a "nonparticipant" merely because he has not been reported.

[14] The possibility of a later recoupment action, as suggested by the Sixth Circuit, would not safeguard the Funds. There is no way to predict

Footnote continued on next page.

This reply will focus on five issues: 1) the contractual right to audit; 2) the relevance of the IRS and FLSA analogy; 3) the inability of the Union to assure against employer misconduct; 4) the discretionary nature of audits and the distinction between a *right* to audit and *a fiduciary duty* to audit; and 5) the proper balance to be struck when confidentiality claims are raised.

ARGUMENT

I. THE TRUSTEES' INTERPRETATION OF THE TRUST AGREEMENTS IS REASONABLE IN LIGHT OF THE PURPOSES OF ERISA

The Sixth Circuit held and Transport insists that the Trustees' interpretation of the Fund Trust Agreements should be disregarded despite the fact that these instruments bestow plenary powers of construction on the Trustees and that good faith interpretations are expressly binding on employers, employees and unions (Art. IV, Sec. 17). *Schneider Moving and Storage v. Robbins*, 104 S. Ct. 1844, fn. 18 (1984). The Trustees' construction of the term "pertinent records" in the audit clause of the Trust Agreements (Art. III, Sec. 5) is entitled to great deference unless it can be shown that this construction has *no* basis in fact or law. In fact, unless the term "pertinent records" cannot under *any reasonable interpretation* encompass verification data relating to all persons employed by an employer, a reviewing court has no authority to intrude on Trustee discretion and substitute its wisdom for that of the Trustees. *See* P.C., pp. 17-18; 26-29; M.B., pp. 46-48; *Riley v. MEBA Pension Trust*, 520 F.2d 406 (2d Cir. 1977). Any other alternative

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whether *any* company will be financially solvent in the future when employees may make claims on the Funds and the Funds discover reporting omissions. Several of the original Defendants at bar are no longer contributing to the Funds at this time and several no longer exist as distinct entities. The implication by Transport and its Amicus that all the Defendants are large and financially solvent operations is unsupported and untrue. Moreover, delay is inherently prejudicial to the Funds because of the risk of bankruptcy. It is well-known that bankruptcies are rampant in the trucking industry. Central States' accounts receivable (reported to the government on Form 5500) have increased in the past three years. The greatest increase is due to receivables attributable to bankrupt companies. Access to records of companies that have undergone corporate restructuring or bankruptcy may well be problematic.

would hinder centralized trust administration and militate against the creation of uniform fiduciary standards as Congress contemplated.

Significantly, the term "pertinent records" has been in the Trust Agreements since the 1950s. In 1974 and again in 1980, these instruments were carefully reexamined and revisions made to assure that they effectuated the purposes set forth by Congress in ERISA and MPPAA. Among these purposes is the vigorous enforcement of employer contributions on behalf of *all* persons who *in fact* perform work covered by operative collective bargaining agreements. In 1974, the Trustees were well aware that the success of their enforcement strategies depended in part on obtaining sufficient access to employer records to verify that an employer was remitting *all* required contributions. The term "pertinent records" was left unchanged because the Trustees believed this term would afford sufficient flexibility to make each audit "reasonable" in the circumstances while also affording sufficient access to data to implement Congressional mandates on collection, funding and disclosure to plan participants. As this Court has stated: "Contracts created by, or entered into under, the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed." *Tennessee Bond Cases*, 114 U.S. 663, 688 (1885), quoting *Florida Central Railroad Co. v. Schutte*, 103 U.S. 118 (1880). *Accord, Aetna Casualty & Surety Co. v. Woods*, 565 S.W.2d 861, 864 (Tenn. 1978); Restatement, *Contracts* § 236(f). *See also Schneider, supra*, fn. 5. In light of the Congressional policies the Trustees seek to implement through their field audit program, a broad construction of the term "pertinent records" is reasonable, rational, logical, and, after 25 years, consistent.

The court of appeals had no justification for translating the term "pertinent records" into the narrowest possible subset, records of "concededly covered employees." Significantly, the *CRST* panel on which the court relied, never *analyzed* this phrase. *See Central States, et al. v. CRST*, 641 F.2d 616 (8th Cir. 1981). Nor did the Sixth Circuit; it merely made a sweeping conclusion. Surely, the Trustees could have used the term "employee" had they intended to limit the scope of their on-site audits to the records of

"concededly covered employees." It is unreasonable to assume that the Trustees would have established a field audit program and obtained contractual agreement to physical entry on an employer's premises, without having equipped themselves with the power to verify an employer's representations of coverage. The contention that the Trustees' interpretation of the term "pertinent records" is tantamount to making every employee a participant in Central States' plans clearly strains both logic and syntax. The court incorrectly disregarded the reasonableness of the Trustees' interpretation and ignored their clear intent. As the Government also believes (Am. B., pp. 26-29), the Trust Agreements, properly construed, provide a contractual right to conduct random general audits.

II. CENTRAL STATES NEEDS THE TYPE OF AUDIT REQUESTED

a) The IRS and FLSA analogies

Transport objects that Central States has set itself up as a quasi-governmental agency, requesting investigative and subpoena powers without benefit of a statute, merely because federal law covers pensions and ERISA states a lofty goal (R.B., p. 23). Transport misses the point. Central States only argues by analogy, a traditional method of establishing law: "courts should not only apply statutes in those situations directly covered by their terms, but should reason from them by analogy to establish law in related areas, in the same way that judicial precedents are employed to control cases that are analogous, but not idential"[15]. The purpose of reading statutes analogically is to better understand the general social reasons that underlie a particular act and thus the specific problem to be cured.

The Funds operate of necessity by means of a self-reporting system. Hence, the need to monitor employer reporting in *this* self-reporting system may reasonably be measured by the need to monitor reporting in *other* self-reporting systems. If human behavior is such that self-reporting systems inherently generate an incentive to evade a *particular obligation*, and if such systems also *provide the*

[15] "The Relevance of Legislative Facts in Constitutional Law," 114 *U. Pa. L.R.* 637, 640, fn. 6 (1966), summarizing Landis, "Statutes and the Sources of Law," *Harvard Legal Essays* (1934), 213-46.

possibility for evasion, then the issue is one of finding an appropriate *methodology* to curb such behavior and to identify evaders. The critical distinction is therefore not one between "public" and "private;" the issue is whether Trustee audits of contributing employer records could serve an analogous function in promoting the underlying social goals and explicit objectives of ERISA that IRS and DOL audits serve in promoting the underlying social goals and explicit objectives of the IRC and the FLSA. If Trustee audits do *in fact* serve these purposes, then the *methodology* must be regarded as *prudent* and hence authorized by 29 U.S.C. § 1104(a)(1)(B) and the Trust Agreements unless a *countervailing evil* can be shown. Transport has cited no facts or authority showing that Fund audits are or cause evil. The Trustees never claimed subpoena powers.

b) Union efforts do not afford an adequate safeguard

In *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), this Court stated that unions do not owe an affirmative duty of fair representation to retirees since they are no longer members of the bargaining unit. In *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), this Court suggested that unions can legitimately strive to maximize overall compensation for the bargaining unit as a whole even if this means sacrificing individual elements of the compensation package. Finally, in *Schneider Moving & Storage v. Robbins*, 104 S. Ct. 1844, 1851 (1984), this Court just last term stated that unions do not owe a duty of fair representation to trustees.

For these reasons and in view of a fiduciary duty to retirees, the Court agreed that it would be unreasonable for trustees to *rely on the union* to prosecute their disputes with employers through the grievance mechanisms of collective bargaining agreements, particularly where governing Trust Agreements appeared to contain plenary enforcement powers. The Court noted that if the "Union disagreed with the trustees' construction of the agreement, it could refuse to arbitrate the claim, or compromise the trustees' position in arbitration," which would adversely affect the outcome of any subsequent judicial proceeding under *Steelworkers* principles (p. 1851; fn. 21).

This reasoning conflicts with the notion that trustee access to records *for audit purposes* should properly be

limited by a prior determination of coverage by the Union and the employer, as advocated by Transport and the Sixth Circuit in reliance on *Central States, et al. v. CRST*, 641 F.2d 616 (8th Cir. 1981). (In 1983, the Eighth Circuit *en banc* already *concluded* that *CRST* was incorrectly decided. *Robbins, et al. v. Prosser, et al.*, 700 F.2d 433 (8th Cir. 1983), *aff'd* by this Court in *Schneider, supra*. Although the Eighth Circuit did not *judicially* determine *on the merits* the permissible scope of a trustee audit, it repudiated the idea that trustee audit rights can be limited by any actions of the employer or the Union unilaterally or *inter sese*.) From the foregoing it is clear that it would be unreasonable for the Trustees to rely on unions to monitor employer reporting and to ferret out undisclosed or misreported participants even if they were in an informational position to do so.

Local unions, however, are *not* in an informational position to supplant or even to supplement the Funds' audit function with any degree of reliability. Article 24 of the NMFA does *not* provide the Union with the right to conduct *random routine* audits (App. A, p. 10). Similarly, the NMFA Supplemental Agreements provide access to records concerning only individual pay disputes and specific grievances (App. A, p. 13). In accordance with case law defining the scope of Section 8(a)(5) of the NLRA, these inspection rights could be expanded, *infra*. However, the Union would *first have to show specific operative facts*, such as actual conduct threatening to destroy the integrity of the bargaining unit or industry standards. *Hollywood Brands v. NLRB*, 53 L.R.R.M. 1-12 (1963), *aff'd*, 324 F.2d 956 (5th Cir. 1963); *Curtiss-Wright v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *NLRB v. Rockwell Standard*, 410 F.2d 953 (6th Cir. 1969). In contrast, random fund audits are not predicated on a showing of "operative facts." Moreover, the Funds could as little compel the Union to obtain records through 8(a)(5) unfair labor practice proceedings as it could compel the Union to arbitrate coverage disputes. *See Schneider, supra*. Yet the Funds not the Union, are financially liable.

Nor can Unions *physically* monitor employer reporting with any degree of completeness, particularly in industries populated with seasonal or transient employees. A large number of Central States' contributing employers are engaged in the trucking industry, many under the NMFA. The

main contract expressly covers "owner-operators";[16] several supplements also cover "casuals." An "owner-operator" on the payroll for 30 days or more is currently entitled to a pension contribution of $55.00 per week. Likewise, an Over-the-Road or Local Cartage "casual" is currently entitled to an $8.00 contribution for each "tour of duty" (R.B., pp. 29a-31a). "Owner-operators" are typically dispatched from their homes and travel from shipper to receiver without reporting to a terminal. "Casuals" may work for several carriers in the same week, servicing sudden influxes of work or filling in as replacements for absentee regulars (App. A, p. 7). Unions cannot keep track of the employment of such drivers so as to assure correct reporting. Shop stewards are *not* on duty in terminals 24 hours a day and are often on the road themselves. (See R.B., p. 30). Moreover, of all the NMFA Supplements, only Local Cartage requires employers to remit monthly lists of casuals (App. A, p. 13). However, the Union *must rely* on the employer to list *all casuals who in fact* work. Such information is not readily verifiable.

The Sixth Circuit thought that seniority lists could serve as effective indicia of employer compliance. Transport and its Amicus plead for reliance on dues check-off lists. However, both lists are *generated or supplemented by the employer not the Union* (App. A, pp. 8, 10). Although employees may complain if their names do not appear on posted seniority lists, they may have incentives not to do so. A newly-hired employee is the first to be laid off under the NMFA and is particularly vulnerable to coercion by an employer if he presses for the contributions that accrue with seniority. A new seniority employee may also wish to avoid union dues or initiation fees and may not object to the absence of his name on the list, especially if long-term employment seems doubtful. The critical fact is: the *employer* is in a unique position to know which employees are entitled to seniority because they have fulfilled the requisite probationary period. Thus, the Union must largely rely on the employer to list employees appropriately.

The same is true of dues check-off lists. A careful reading of Article 3, Section 3 (R.B., p. 30) reveals that

[16] In *Local 24, IBT v. Oliver*, 358 U.S. 283 (1959), this Court upheld the "owner-operator" provision of the NMFA against a state antitrust challenge. Speaking for the majority, Justice Brennan stated that these drivers' terms and conditions of employment were mandatory subjects of bargaining.

once the Union has generated *a baseline list*, for example, upon organizing a company, it must *rely on the employer to add new employees* to the previously certified list each month as well as to delete terminated employees. Unions may have difficulty ferreting out employees who do not voluntarily authorize dues check-off. Hence, the Union is in an analogous position to the Trustees who *must also rely on employers to report fluctuations in the base group* initially reported. *See* M.B., p. 12. It may also be noted that "casuals" are, by definition, *not* "seniority" employees and would not appear on either of these lists. (Significantly, while the Funds are entitled to contributions on behalf of casuals, the Union is not entitled to dues unless a casual achieves seniority and thus becomes a regular employee.) Similarly, "owner-operators," believed by the carrier to be "independent contractors," would also be omitted. *See Byrnes v. DeBolt Transfer*, 741 F.2d 620 (3d Cir. 1984). In sum, the Funds are being asked to rely on the Union which itself has to rely on the employer. This would not adequately protect the Funds. Contrary to Transport's contentions (R.B., p. 34), a company would have substantial incentive not to report "casuals" and "owner-operators." Because these employees are not easily traceable, the danger of grievances, unfair labor practice charges, or economic action would be minimal, and the company could save a lot of money.[17] Side arrangements may also exist. *Central States et al. v. Kraftco, Inc.*, 589 F. Supp. 1061 (M.D. Tenn. 1984; appeal pending); *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981).

c) Audits are discretionary: the *right* to audit is *distinct from a fiduciary duty to audit*

Transport argues that if this Court grants Central States' Trustees the right to conduct the audit requested, the Court will thereby also enlarge the scope of ERISA's fiduciary duty rule and hence impose new surveillance obligations on unsuspecting Trustees (R.B., pp. 15, 40). The ultimate result, Respondent says, will be that trustees of every fund

[17] The omission of "casuals" is just one of a series of abuses Fund audits are designed to prevent. However, the problem is serious. Indeed, the Fund recently discovered, through an audit, nonreported casuals with contributions owing in excess of $300,000.00 from a single employer. The company has paid the amount discovered.

will have to audit every record of every employer every year beginning with 1975 when ERISA took effect at a "staggering" cost both to the funds and to contributing employers. This is patent nonsense.

ERISA's "fiduciary duty" rule is circumscribed by notions of "prudence," "reasonableness" and due care in the "circumstances." Central States is a very large fund that operates on a self-reporting system and contains actual or potential participants whose existence easily eludes the eye of the Union and who may also be covered by "right to work" laws so that Union records may not be available for corroboration. Its Trustees, familiar with circumstances pertinent to the *Central States Funds*, have determined on the basis of experience that random general audits protect Fund integrity. Amici Bricklayers and NCCMP have concluded likewise with regard to their funds. The Solicitor General and the Solicitor of Labor believe random general audits are justifiable and fall within the *permissible* (as opposed to *mandatory*) reach of ERISA. These Amici also agree with Petitioners that Congress left the task of monitoring employer contributions *primarily* to fund trustees and not to the government (Am. B., p. 20). If trustees of other funds do not believe such audits are necessary, they are free, at their *discretion*, to devise other strategies for monitoring contributions. *See Nichols v. Asbestos Workers, supra*. So long as such methods are "prudent" and "reasonable" in the circumstances, they, too, will fall within ERISA's fiduciary duty rule. Petitioners do not ask this Court to mandate that *all trustees of all funds* follow the Central States field audit program.

III. THE TRUSTEES' NEED FOR INFORMATION OUTWEIGHS TRANSPORT'S INTEREST IN THE CONFIDENTIALITY OF EMPLOYEE RECORDS

Central States believes that the privacy interests of *covered as well as noncovered* employees should be a legitimate concern both of society at large and employers in particular. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). This is why the Trust Agreements expressly protect the confidentiality of participants' names and addresses (Art. III, Sec. 5) and why Fund audits are subject to substan-

tial safeguards to protect the confidentiality of *all records*, particularly from unconsented disclosure to third persons (App. I P.C.). However, as Transport concedes, the right to privacy is neither absolute nor abstract (R.B., pp. 43-47). Certainly, it is well-established that the "zone of privacy" protected by the Constitution is carefully circumscribed. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The individual's right to be left alone cannot and should not be elevated into a right to obstruct remedial legislation.

In the context of collective bargaining, the key to disclosure is "relevance" and the liberal discovery standard applies to Union requests for information. *NLRB v. Acme Industrial Corp.*, 385 U.S. 432 (1967). The *same* standard applies whether the information sought concerns unit or nonunit members; it is only the *burden of establishing relevance* that shifts. Thus, data involving *unit employees* or mandatory subjects of bargaining is generally regarded as *presumptively relevant* whereas data involving *nonunit employees* or bargainable issues is generally regarded as *demonstrably relevant*. *See* cases cited, *supra*, p. 13; *Oil, Chemical & Atomic Workers Local v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). The "particularized reasonable cause standard" imposed on the Trustees by the Sixth Circuit *does not coincide* with NLRB principles. It is far more stringent a threshold for disclosure than the showing of "probable" or "potential" *relevance* articulated by this Court in *Acme, supra*,[18] even though the interests served by the Funds are far broader than those served by a Union.

Since *Detroit Edison*, of course, relevance is not the whole answer. The NLRB and reviewing courts are required to ask additional questions and balance other factors: for example, whether the materials requested are truly sensitive; whether they can reasonably be sanitized; whether alternative or sanitized data is adequate; whether express promises of confidentiality have been made with respect to the materials requested; whether a legitimate expectation of privacy exists with respect to such data; whether consent to disclosure should be required; whether

[18] The "particularized" cause standard also goes far beyond that imposed on OSHA investigators in *Marshall v. Barlow's*, 436 U.S. 307 (1978), cited by Transport at R.B., pp. 11, 24. Rejecting warrantless searches as a violation of the Fourth Amendment, the Court also rejected the notion of "probable cause" based *only* on "specific evidence of an

Footnote continued on next page.

the burden of obtaining consent is possible, minimal, or oppressive; whether the party seeking disclosure has an incentive to "leak" information or to use it impermissibly; whether it has done so in the past; whether even inadvertent leaks would cause substantial harm; and whether the person resisting disclosure has a motive to withhold information that is unrelated to a legitimate interest in confidentiality. Central States has already addressed most of these questions and demonstrated that, on balance, the Trustees' need for information outweighs Transport's interest in the confidentiality of its employee records. However, some additional comments are appropriate.

First, Central States primarily seeks information corroborating job classification as well as the completeness of an employee population. Significantly, the Privacy Protection Study Commission (referred to by Transport at p. 48) designates wage and job classification data as "Directory Information" and excepts it from a pre-disclosure consent requirement. (*See Personal Privacy in an Information Society*, App. 3, "Employment Records" (1978), pp. 96-99).[19] Second, there is nothing in the record establishing that Transport made an express promise of confidentiality to "noncovered" employees. Third, "noncovered" employees can have no realistic expectation of privacy concerning basic tax, payroll, and directory-type information since unions may be entitled to this information and more, upon a proper showing, under Section 8(a)(5) of the NLRA. The employer could not keep a promise of confidentiality in such a situation and nonunit employees may properly be said to have constructively waived the right to privacy by accepting employment with an employer

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Footnote continued from previous page.

existing violation." A lawful warrant need only show "that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources . . ." (p. 321). Fund audits are predicated on an analogous concept of cause.

[19] Transport also refers to state "Miniprivacy Acts." These state laws seem primarily designed to permit an employee to obtain access to his own records or to prohibit the dissemination of such information to third persons for reasons unrelated to the purpose for which such records were collected and maintained. 29 U.S.C. § 1059 requires employers to keep records for *all* of their employees to enable a Plan Administrator to determine the eligibility and benefit status of plan participants. Fund audits do not violate the underlying polices of state "Miniprivacy Acts." To the extent state laws could be used to vitiate the purposes either of the NLRA or ERISA, they would be preempted.

who has organized operations subject to federal law. Fourth, Central States has agreed to accept "sanitized" information about management personnel. Fifth, the task of obtaining individual employee consent would be burdensome, if not impossible. Sixth, Transport has not shown that Central States ever "leaked" employee records or used them in a manner unrelated to proper fund administration as required by the Trust Agreement. Seventh, Transport has not shown that Central States has an "incentive" to "leak" information to unions or competing employers in violation of the neutrality rule imposed on fund trustees as ERISA fiduciaries in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). Eighth, Transport has not shown how irreparable harm would result from an inadvertent leak. Finally, Transport has offered no viable alternatives to fund audits because it refuses to acknowledge that a "public interest purpose" exists underlying the request for information.

The latter factor causes Transport's FOIA and Privacy Act analogy to fail. The Freedom of Information Act (5 U.S.C. § 522) is a "sunshine" act. Thus, its nine express statutory exemptions have been narrowly construed and are also regarded as exclusive. *EPA v. Mink*, 410 U.S. 73 (1973). Exemption 6, however, covers medical, personnel and similar files (5 U.S.C. § 522(b)(6)). FOIA requests for such files may be refused by a governmental agency *if* disclosure would be a "clearly unwarranted invasion of personal privacy." Hence, a balancing test is required to determine whether a "*public interest* purpose" underlies a FOIA request sufficient to outweigh a *private interest* in confidentiality. If, on balance, disclosure of the information is *required* under the FOIA, it is *not protected* by the Privacy Act of 1974. (*See* 5 U.S.C. § 552(b)(2). Central States has established an important "public interest purpose" in support of its audits; the vast majority of records requested also represent a *de minimus* intrusion on personal privacy.

Central States *has* offered a mechanism to safeguard confidentiality. More importantly, Central States has an institutional incentive to prevent unauthorized disclosures. The success of its field audit program depends on the cooperation of employers; if confidential information is leaked to unions or competing employers, whether by negligence or design, employers will simply withhold the data. The analysis offered by Justice White in his *Detroit Edison*

dissent (Justices Marshall and Brennan concurring) speaks directly to this point and should apply by analogy to the facts at bar (440 U.S. at 323). However, even if trustees acted against the Funds' long-term interest and improperly disclosed confidential information, there are available remedies based on breach of contract or tort. In sum, Respondents should not be permitted to raise the privacy interests of their employees as a shield against legitimate inquiry on the speculative assertion that Central States will abuse its fiduciary powers. Ultimately, every worker who is or may become a participant in any ERISA plan has an interest in the accuracy of employer reporting. Hence, Transport's "noncovered" employees, who allegedly participate in other ERISA plans, also have a stake in Central States' access to records!

CONCLUSION

To resolve the dispute at bar, this Court must decide whether "random general audits," defined as "independent verification procedures," are "prudent" and therefore encompassed by ERISA and the Trust Agreements; for audits limited to the records of "concededly covered employees," as advocated by Transport and endorsed by the Sixth Circuit, are nothing more than an extension of the honor system that already exists with respect to employer reporting. The "particularized reasonable cause standard" effectively assures that *no one* — not Trustees, not the Union, not the Secretary of Labor — will be able to detect evaders and identify undisclosed participants except on an *ad hoc* piecemeal basis. Hence, if this Court permits the Sixth Circuit's ruling to stand, it should also carve an exception to the ERISA and DOL rule that eligibility depends on the performance of hours of service in covered employment regardless of employer defaults in contributions. In sum, if Central States' audits are "fishing expeditions" (R.B., pp. 10, 22, 24, 42), its Trustees are fishing with a license issued by Congress. Thus, unless this Court is prepared to insulate multiemployer funds from liability to participants whose employers failed to report them and who themselves did nothing to secure their entitlement to benefits, it must reverse the court of appeals' decision. If it does not, the correlation between disbursements from and contributions to such plans will be permanently and irrevocably skewed.

Respectfully submitted,

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Dated: November 15, 1984

NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

PETITIONERS' APPENDIX

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APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A: Relevant Provisions of the Collective Bargaining Agreement A-1

APPENDIX B: *Central States, et al. v. R-W Service System, Inc.*, No. 82-1899 (6th Cir. Aug. 25, 1984) A-14

APPENDIX C: Cost of Fund audit of Central Transport A-19

Appendix A
Relevant Provisions
of the Collective Bargining Agreement

APPENDIX A

NATIONAL MASTER FREIGHT AGREEMENT

Covering
OVER-THE-ROAD
and
LOCAL CARTAGE
EMPLOYEES OF PRIVATE
COMMON, CONTRACT AND
LOCAL CARTAGE CARRIERS
For the Period of
April 1, 1976
through
MARCH 31, 1979

Appendix A
Relevant Provisions
of the Collective Bargaining Agreement

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 3.

Recognition, Union Shop and Check-Off

Section 1.

Recognition

(a) The Employer recognizes and acknowledges that the National Union Committee and Local Unions affiliated with the International Brotherhood of Teamsters are the exclusive representatives of all employees in the classifications of work covered by this Master Agreement, and Supplements thereto for the purpose of collective bargaining as provided by the National Labor Relations Act.

Subject to Article 2, Section 3 (Non-Covered Units), this provision shall apply to all present and subsequently acquired operations and terminals of the Employer.

This provision shall not apply to wholly-owned and wholly independently operated subsidiaries which are not under contract with local IBT unions. "Wholly independently operated" means, among other things, that there shall be no interchange of freight, equipment or personnel, or common use, in whole or in part, of equipment, terminals, property, personnel or rights.

Union Shop

(b) All present employees who are members of the Local Union on the effective date of this subsection or on the date of execution of this Agreement, whichever is the later, shall remain members of the

Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall become and remain members in good standing of the Local Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day following the effective date of this subsection or the date of this Agreement, whichever is the later. An employee who has failed to acquire, or thereafter maintain, membership in the Union as herein provided, shall be terminated seventy-two (72) hours after his Employer has received written notice from an authorized representative of the Local Union, certifying that membership has been, and is continuing to be, offered to such employee on the same basis as all other members and, further, that the employee has had notice and opportunity to make all dues or initiation fee payments. This provision shall be made and become effective as of such time as it may be made and become effective under the provisions of the National Labor Relations Act, but not retroactively.

Hiring

(c) When the Employer needs additional men he shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union.

State Law

(d) No provision of this Article shall apply in any state to the extent that it may be prohibited by state law. If under applicable state law additional requirements must be met before any such provision may become effective, such additional requirements shall be first met.

Agency Shop

(e) If any agency shop clause is permissible in any state where the provisions of this Article relating to the Union Shop cannot apply, the following Agency Clause shall prevail:

(1) Membership in the Local Union is not compulsory. Employees have the right to join, not join, maintain, or drop their membership in the Local Union, as they see fit. Neither party shall exert any pressure on, or discriminate against, an employee as regards such matters.

(2) Membership in the Local Union is separate, apart and distinct from the assumption by one of his equal obligation to the extent that he receives equal benefits. The Local Union is required under this Agreement to represent all of the employees in the bargaining unit fairly and equally without regard to whether or not an employee is a member of the Local Union. The terms of this Agreement have been made for all employees in the bargaining unit and not only for members in the Local Union, and

this Agreement has been executed by the Employer after it has satisfied itself that the Local Union is the choice of a majority of the employees in the bargaining unit. Accordingly, it is fair that each employee in the bargaining unit pay his own way and assume his fair share of the obligation along with the grant of equal benefits contained in this Agreement.

(3) In accordance with the policy set forth under subparagraphs (1) and (2) of this Section all employees shall, as a condition of continued employment, pay to the Local Union, the employee's exclusive collective bargaining representative, an amount of money equal to that paid by other employees in the bargaining unit who are members of the Local Union, which shall be limited to an amount of money equal to the Local Union's regular and usual initiation fees, and its regular and usual dues. For present employees, such payments shall commence thirty-one (31) days following the effective date or on the date of execution of this Agreement, whichever is the later, and for new employees, the payment shall start thirty-one (31) days following the date of employment.

Appendix A
Relevant Provisions
of the Collective Bargaining Agreement

Savings Clause

(f) If any provision of this Article is invalid under the law of any state wherein this contract is executed, such provision shall be modified to comply with the requirements of State Law or shall be renegotiated for the purpose of adequate replacement. If such negotiations shall not result in mutually satisfactory agreement, either party shall be permitted all legal or economic recourse.

Employer Recommendation

(g) In those instances where subsection (b) hereof may not be validly applied, the Employer agrees to recommend to all employees that they become members of the Local Union and maintain such membership during the life of this Agreement, to refer new employees to the Local Union representative, and to recommend to delinquent members that they pay their dues since they are receiving the benefits of this Agreement.

Future Law

(h) To the extent such amendment may become permissible under applicable Federal and State Law during the life of this Agreement as a result of legislative, administrative or judicial determination, all of the provisions of this Article shall be automatically amended to embody the greater Union security provisions contained in the 1947-1949 Central States Area Over-the-Road Motor Freight Agreement, or to apply to become effective in situations not now permitted by law.

Appendix A
Relevant Provisions
of the Collective Bargining Agreement

No violation of Law

(i) Nothing contained in this Section shall be construed so as to require the Employer to violate any applicable law.

Section 2. Probationary and Casual Employees

A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty-day trial basis, during which period he may be discharged without further recourse; provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty days, the employee shall be placed on the regular seniority list.

In case of discipline within the thirty-day period, the Employer shall notify the Local Union in writing.

Any employee hired as a casual or part-time worker shall not become a seniority employee under these provisions where it has been agreed by Employer and Union that he was hired for casual or part-time work. The words "casual" or "part-time" as used herein are meant to cover situations such as replacement for absenteeism and vacations.

Any employee hired as a casual or part-time worker shall not become a seniority employee until he meets the requirements of the appropriate Suppiemental Agreement under which he is employed.

If employees are hired through an employment agency, the Employer is to pay the employment agency fee.

However, if the Local Union was given equal opportunity to furnish employees under Article 3, Section (1)(c), and if the employee is retained through the probationary period, the fee need not be paid until the 31st day of employment.

Section 3. Check-Off

The Employer agrees to deduct from the pay of all employees covered by this Agreement the dues, initiation fees and/or uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions prior to the end of the month for which the deduction is made. Where laws required written authorization by the employee, the same is to be furnished in the form required.

The Local Union shall certify to the Employer in writing each month a list of its members working for the Employer who have furnished to the Employer the required authorization, together with an itemized statement of dues, initiation fees (full or installment), or uniform assessments owed and to be deducted for such month from the pay of such member and the Employer shall deduct such amount from the first paycheck following receipt of statement of certification of the member and remit to the Local Union in one lump sum. The Employer shall add to the list submitted by the Local Union the names of all regular new employees hired since the last list was submitted and delete the names of employees who are no longer employed.

Check-off shall be on a monthly or quarterly basis at the option of the Union.

When an Employer actually makes a deduction for dues, initiation fees and assessments, in accordance with the statement received from an appropriate Local Union, he shall remit same no later than thirty (30) days from the date such deduction was made and in the event he fails to do so, he shall be assessed ten percent (10%) liquidated damages.

Where an employee who is on check-off is not on the payroll during the week in which the deduction is to be made, or has no earnings or insufficient earnings during that week, or is on leave of absence, the employee must make arrangements with the Local Union and/or the Employer to pay such dues in advance.

The Employer will recognize authorization for deductions from wages, if in compliance with state law, to be transmitted to the Local Union or to such other organizations as the Union may request if mutually agreed to, except DRIVE deductions which shall be made annually. No such authorization shall be recognized if in violation of state or federal law. No deduction shall be made which is prohibited by applicable law.

In the event that an Employer has been determined to be in violation of this Article by the decision of an appropriate grievance committee, and if such Employer sub-

sequently is in violation thereof after receipt of seventy-two (72) hours written notice of specific delinquencies, the Local Union may strike to enforce this Article. However, such strike shall be terminated upon the delivery thereof. Errors or inadvertent omissions relating to individual employees shall not constitute a violation.

ARTICLE 5.

Posting Seniority List

(d) The Union shall be entitled to a seniority list each six months upon request. The Employer shall post a seniority list at least once every twelve (12) months and shall maintain a seniority roster at the terminal. Protest of any employee's seniority date or position on such list must be made in writing to the Employer within thirty (30) days after such seniority date or position first appears, and if no protests are timely made the dates and positions posted shall be deemed correct. Any such protest which is timely made may be submitted to the grievance procedure.

ARTICLE 24.

Inspection Privileges

Authorized agents of the Union shall have access to the Employer's establishment during working hours for the purpose of adjusting disputes, investigating working conditions, collection of dues, and ascertaining that the Agreement is being adhered to, provided, however, there is no interruption of the firm's working schedule.

Appendix A
Relevant Provisions
of the Collective Bargining Agreement

Central States Area
LOCAL CARTAGE SUPPLEMENTAL AGREEMENT

Covering

EMPLOYEES OF PRIVATE,

COMMON, CONTRACT AND

LOCAL CARTAGE CARRIERS

For the Period of

APRIL 1, 1976

Through

MARCH 31, 1979

Appendix A
Relevant Provisions
of the Collective Bargaining Agreement

ARTICLE 41.

Probationary Employees and Work Assignments

Section 1.

Probationary Employees

(a) A new probationary employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial basis, during which period he may be discharged without further recourse; provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members.

(1) Any new employee must work thirty (30) cumulative work days within any ninety (90) calendar day period and upon completion thereof, shall be considered a regular employee and placed on the seniority list. Such employee's seniority date for all purposes shall be established as of the first day worked in such ninety (90) calendar day period in which he meets the requirement aforementioned.

(2) Any day worked, regardless of whether or not he was used as a replacement, shall be counted in determining whether or not he has qualified under the above provisions. A man can gain seniority by qualifying under the above provisions only.

(3) It is further mutually understood that any employee who shall work a total of fifty-five (55) work days within

any twelve (12) month period shall also accrue seniority under the provisions of this article and in such instance his or her seniority date for all purposes shall be thirty (30) work days back from the day he or she works the fifty-fifth (55th) work day.

(4) No later than the 10th of each month, the Employer shall furnish an alphabetical list of all casuals worked during the previous month to the Local Union.

In case of discipline within the thirty-day period, the Employer shall notify the Local Union in writing.

ARTICLE 44.

Section 7. Examination of Records

The Local Union, Joint Local Area Committee, Joint State Cartage Committee, or the Joint Area Cartage Committee shall have the right to examine time sheets and any other records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute, or records pertaining to a specific grievance.

APPENDIX B

Not for Publication
No. 82-1899
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES SOUTHEAST and SOUTHWEST AREAS HEALTH and WELFARE FUND, and JOHN E. DWYER,
Plaintiffs-Appellees,

v.

R-W SERVICE SYSTEM, INC.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed AUG 25 1984

Before: KEITH and KRUPANSKY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

Per Curiam. R-W Service System, Inc. brings this interlocutory appeal from an order of the district court requiring it to make available to Plaintiffs certain records concerning all of its employees and other records it may have, or that are reasonably obtainable from third parties. For the reasons set forth below, we reverse the district court and remand for further proceedings not inconsistent with this opinion.

I

Plaintiffs-Appellees, the Central States Southeast and Southwest Areas Pension Fund, and Central States Southeast and Southwest Areas Health and Welfare Funds, (the Funds) are multiemployer-employee benefit trust funds es-

tablished in accordance with Section 302 (c)(5) of the Labor Management Relations Act of 1947, as amended. (29 U.S.C. §186(c) (5), LMRA). Both Funds are also subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*

Defendant-Appellant, R-W Service System, Inc. (R-W) is a trucking company, and a signatory to the National Master Freight Agreement and supplemental collective bargaining agreements with various local unions. The collective bargaining agreements require that R-W make payments to the Funds on behalf of employees covered by the collective bargaining agreement. (''Covered'' employees). An employee is covered by the collective bargaining agreements if engaged in a job classification described in the Master Freight agreement or supplements. During all relevant times the collective bargaining agreements required specified weekly contributions on behalf of employees in the enumerated job classifications.

In 1978 Plainiffs brought suit on behalf of their participants and beneficiaries to collect delinquent contributions, to compel R-W to produce certain records, and submit to an audit. The district court assumed jurisdiction under § 301 of the LMRA and § 502 of ERISA. Plaintiffs filed a motion for partial summary judgment to compel Defendant to provide various records and to submit to an audit.

At issue in the present appeal is an order of the district court of November 2, 1982 compelling defendant to ''make personnel files and payroll data for *all* employees available to Plaintiffs.'' (emphasis in original). In addition, the district court ordered R-W to provide the Funds ''with all records that it presently maintains, as set forth in the Magistrate's Report and Recommendation . . . [and] with all records to the extent that they are reasonable [*sic*] obtainable from third parties.''[1]

[1] As set forth in the Magistrate's Report, the records subject to production included, *inter alia*, time cards or driver's logs, trip manifests, dispatch sheets, delivery receipts, bills of lading, freight bills, 941 F.I.C.A. Quarterly Returns.

Appendix B

II

In concluding Plaintiffs were entitled to have access to personnel and payroll records for *all* employees of R-W, the district judge was guided by another opinion from the same district in a similar case, reaching the same conclusion. *Central States, et al. v. Central Transport*, 522 F.Supp. 658 (E.D. Mich. 1981). However, subsequent to the filing of the notice of appeal in the case at bar (but before filing of briefs) this Court reversed the district court in *Central Transport* in a well reasoned opinion authored by Judge Kennedy. *Central States, et al. v. Central Transport*, 698 F.2d 802 (6th Cir. 1983) *petition for cert.* granted, 52 U.S.L.W. 3902 (June 18, 1984). R-W contends that the decision of the district court in the case at bar must be reversed in light of this Court's decision in *Central Transport*. Plaintiffs seek to distinguish *Central Transport*. We are of the opinion that this Court's opinion in *Central Transport, supra*, 698 F.2d 802 is dispositive in the case at bar with respect to the authority of Plaintiffs to examine records of noncovered employees. In *Central Transport* this Court held that a trustee does not have a statutory or contractual right under ERISA or the trust agreement to audit records of all employees of the defendants' employees. 698 F.2d at 810. Under *Central Transport*, a trustee has the authority to inspect the employer's books and records "if they have reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement" but has not been classified as a covered employee. 698 F.2d at 810. (emphasis in original).

Plaintiffs have not suggested they have "reasonable cause" to believe that any *particular employee* is covered by collective bargaining but is not classified as a covered employee. The language of *Central Transport* is clear and Plaintiffs' attempts to distinguish the case are simply without merit. Accordingly, the decision of the district court must be reversed to the extent that it is inconsistent with the decision of this Court in *Central Transport*.

III

Defendant R-W also contends it has no obligation to produce records from third parties as is required by the order of the district court.

The district court stated:

> This Court also recognizes the anomaly that, although Plaintiffs are entitled to an audit from 1969-76, Defendant denies having posession of any records which date back that far. For this reason, the Court directs Defendant to provide Plaintiffs with records that are within its actual possession, as well as those records which are within its contructive possession (to wit, third parties).

The order further provided, "Defendant will provide Plaintiffs with all records to the extent that they are reasonably obtainable from third parties."

The production of these records is for the purposes of enabling Plaintiffs to conduct the audit of R-W.

Federal Rule of Civil Procedure 34 provides that a party may request any other party to produce relevant documents "which are in the possession, custody or control of the party upon whom the request is served." "A party may not be compelled to produce papers or things which are not in his possession, custody, or control . . ." 4A J.Moore, *Moore's Federal Practice* ¶ 34.17 (2d ed. 1983 revision), (footnote omitted). 8 Wright & Miller, *Federal Practice & Procedure*, § 2210 (1970). "Inspection can be had if the party to whom the request is made has the legal right to obtain the document, even though in fact he has no copy." *Id.* (footnote omitted).

The district court's order construes those documents within the possession of third parties as within the "constructive possession" of R-W. The court does not address the possession, custody, or control question in particular, with respect to each of the documents sought by Plaintiffs'

from third parties. It is appropriate for the district court on remand to consider, on a case by case basis, whether the documents sought by Plaintiffs are subject to production by the Defendant, and to consider any contentions of Defendant that it has no obligation to produce particular documents. For this Court to address on a document by document basis this issue at this point in the proceedings is at best premature as these contentions have yet to be addressed by the district court.

IV

In accordance with the foregoing, the decision of the district court ordering the production of all of employees' records is reversed in light of this Court's decision in *Central States, et al v. Central Transport*, 698 F.2d 802 (6th Cir. 1983), and the case is remanded to the district court for further proceedings. The district court is authorized to defer action in the instant case until the Supreme Court has announced its decision in the above-cited case in which it has granted certiorari. No costs are taxed. The parties will bear their own costs on the present appeal.

ISSUED AS MANDATE: September 17, 1984

COSTS: NONE

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS

SCHEDULE OF COST TO AUDIT CENTRA, INCORPORATED FEBRUARY 4, 1980 THROUGH MARCH 28, 1980

Auditor	Number of Days Spent on Audit	Total Salary For Days Spent on Audit	Total Expenses Incurred During Audit	Total Cost of Audit (Salary plus Expenses)
R. Dziedic	5	$ 315.00	$ 272.70	$ 587.70
P. Priede	23	1,338.60	2,672.95	4,011.55
T. DeFranco	38	2,128.00	3,810.38	5,938.38
J. Pasia	25	1,655.00	3,607.28	5,262.28
J. Allegretti	5	291.00	512.85	803.85
J. Tolentino	5	280.00	446.54	726.54
A. Saleem	10	560.00	1,028.62	1,588.62
J. Leinbach	5	291.00	466.95	757.95
K. Geiken	25	1,455.00	2,326.50	3,781.50
D. Spenner	1	67.40	180.15	247.55
K. Muhr	5	280.00	438.36	718.36
TOTAL	147	$8,661.00	$15,763.28	$24,424.28